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No. 79-1781

In the Supreme Court of the United States

OCTOBER TERM, 1979

JULIO MOREJON-PACHECO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in holding that he did not have "standing" under the Fourth Amendment to challenge the validity of a search leading to the seizure of evidence against him.

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of cocaine with intent to distribute, distribution of cocaine, and conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. He was also convicted of using a communications facility in furtherance of a drug offense, in violation of 21 U.S.C. 843(b). He was sentenced to a total of 18 years' imprisonment, to be followed by a three-year term of special parole.

The evidence at trial showed that on July 18, 1977, an undercover DEA agent went with petitioner to the home of co-defendants Jorge and Virgen Palenzuela in order to purchase a large quantity of cocaine. While the agent was in the house, he saw two large packages of cocaine and some narcotics paraphernalia.[1] A number of people entered the house during the time the agent was present (Pet. App. 2a, 13a-15a). Before the sale was completed, petitioner grew suspicious that something had gone wrong. Petitioner left the Palenzuela residence and met one of his co-conspirators at another location. He was immediately arrested (*id.* at 14a).

Approximately 25 minutes after the arrests, DEA agents returned to the Palenzuela home, where they arrested the Palenzuelas and another person outside. Because a crowd had begun to gather, the officers took the defendants inside the house. Once inside, the officers conducted a search of the premises to determine the presence of any other persons who might be armed or be able to conceal or destroy the cocaine and other evidence. In the course of that search, the officers found the one-pound package of cocaine that the undercover agent had previously been shown (Pet. App. 3a, 14a-15a).

2. Following an evidentiary hearing before the magistrate, the district court denied petitioner's motion to suppress the cocaine (Pet. App. 1a-7a). Noting that the issue of petitioner's "standing" to seek suppression had not been fully analyzed by the magistrate (*id.* at 3a), the court, after an extended discussion (*id.* at 3a-6a), held that petitioner had "automatic standing" to object to the search of the house and the seizure of the cocaine (*id.* at

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[1]Petitioner had previously shown samples of cocaine to the agent and was attempting to procure 10 kilograms of cocaine to sell to the agent for $380,000 (Pet. App. 12a).

6a).[2] On the merits, the court held that, in view of the exigent circumstances present at the time of the arrests outside the Palenzuela house, the warrantless search of the house was lawful (Pet. App. 6a-7a).

The court of appeals, in sustaining petitioner's conviction (Pet. App. 8a-28a), affirmed the denial of petitioner's motion to suppress on the ground that petitioner did not have "standing" to contest the lawfulness of the search (*id.* at 24a-25a). Finding that the indictment did not charge petitioner with unlawful possession at the time of the search, that petitioner had no proprietary or possessory interest in the premises, and that petitioner was not present at the time of the search, the court concluded that petitioner was not entitled to challenge the validity of the search and object to the admission of the seized evidence (*id.* at 25a).

3. The court of appeals correctly held that petitioner was not entitled to challenge the lawfulness of the search of the Palenzuelas' house.[3] With respect to the issue of "automatic standing," this Court in *United States* v. *Salvucci*, No. 79-244 (June 25, 1980), overturned the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960). Accordingly, petitioner can no longer invoke that doctrine to establish "standing," and his objections to the court of appeals' application of the rule in this case are moot.

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[2]Since the "automatic standing" rule is limited to possessory offenses, the district court's decision established petitioner's "standing" only on the count charging unlawful possession and not on the remaining non-possessory counts.

[3]Petitioner preliminarily argues (Pet. 9-15) that the court of appeals denied him due process by disposing of his Fourth Amendment claim on the ground of "standing," since the government conceded his "standing" in the district court and did not raise the issue on appeal. However, the district court, after expressly observing that the

Relying principally upon *United States* v. *Jeffers*, 342 U.S. 48 (1951), petitioner contends (Pet. 16-29) that his possessory interest in the cocaine seized during the search of the Palenzuelas' house entitles him to challenge that search. In *Salvucci*, however, this Court "decline[d] to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched" (slip op. 8). Rather, the proper Fourth Amendment analysis requires a determination "not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched" (slip op. 9). See also *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980), slip op. 7. In addition, the Court in *Salvucci* rejected the argument, also advanced by petitioner in the instant case, that *Jeffers* had held a possessory or proprietary interest in the seized object to be sufficient to confer Fourth Amendment "standing" to challenge the underlying search (slip op. 7 n.5; see also *Rakas* v. *Illinois*, 439 U.S. 128, 136 (1978)). Hence, petitioner's allegations of a possessory interest in the cocaine fail to satisfy his "burden of establishing that his

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magistrate had not fully examined the problem of petitioner's "standing" (Pet. App. 3a), undertook an extensive analysis of the question (*id.* at 3a-6a). In contrast to the cases cited by petitioner (Pet. 10-11, 13-14) in which the district court had not passed upon the defendant's "standing," the proceedings here adequately served to put petitioner on notice that "standing" was an issue in the case on which the court of appeals might disagree with the district court. Moreover, contrary to petitioner's contention, the court of appeals is not bound by the government's concession on a matter of law such as "standing." See *United States* v. *Tortorello*, 533 F.2d 809, 812 (2d Cir.), cert. denied, 429 U.S. 894 (1976); *United States* v. *Lisk*, 522 F.2d 228, 231 n.8 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976). Finally, as discussed below, petitioner even now has not presented sufficient allegations to establish his "standing" to contest the legality of the search, so that the claimed lack of notice is not in any event prejudicial.

own Fourth Amendment rights were violated by the challenged search * * *" (*Rakas* v. *Illinois*, *supra*, 439 U.S. at 131 n.1).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JULY 1980

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[4]Since the petition does not make out a colorable claim that petitioner's Fourth Amendment rights were infringed, there is no need to remand for further consideration in light of *Salvucci* and *Rawlings*.

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